IN THE SUPREME COURT OF MISSOURI

SCHWARZ PHARMA, INC., n/k/a UCB, INC.,

Relator,

v.

THE HONORABLE DAVID L. DOWD, JUDGE, CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI,

Respondent.

Case No. SC93516

Missouri Court of Appeals,
Eastern District No. ED99877

Circuit Court of St. Louis City
No. 1222-CC10178 (Bryan)

BRIEF OF RESPONDENT

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FACTUAL AND PROCEDURAL OVERVIEW

The factual background and procedural history underlying the instant dispute have been discussed in great detail in prior briefing and will not be repeated here in the interest of brevity.[1] With that said, however, certain procedural matters bear special emphasis in the context of this response.

Specifically, the Original Petition that underlies this action was filed on February 22, 2012, which was subsequently amended by leave of court to include an additional six plaintiffs on July 26, 2012. *See* Relator's Appendix, A6-A127. On August 8, 2012, the circuit court entered an Order severing the claims of the *Anderson* plaintiffs, and found that Plaintiff "need not serve new process" and that "[t]his Order constitutes notice of severance" upon defendants. *See* Rel.'s Appendix, A184.

On November 15, 2012, 99 days after the Court's Order severing the cases, Brand Defendants, including Relator, jointly filed a Motion to Transfer Venue. *See* Rel.'s Appendix, A231. On this same day, Relator, along with its co-Defendants, filed substantively identical motions in numerous other metoclopramide cases. *See* Rel.'s Appendix A237-A292. Thereafter, Defendants Teva, PLIVA, Barr and Baxter submitted motions seeking to join Brand

[1] For a complete recitation of the procedural overview, see Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition of July 12, 2013, which is incorporated as if fully set forth herein.

Defendant's motion. *See* Rel.'s Appendix, A298-A307. Notably, none of these motions asserted that the motion to transfer was timely on the basis that Relator Schwarz had been served in October, the argument upon which Defendant now relies. *See generally* Rel.'s Appendix, A213-A292.

On December 13, 2012, Plaintiff filed her response to Defendants' Motions to Transfer. The thrust of the response was that the motion was untimely because it had been filed more than 60 days after the date of service of the Petition which had occurred on August 8, 2012 by virtue of the circuit court's order severing the cases of that date, and further ordering that no new process need to be served and that its order constituted notice. *See generally* Rel.'s Appendix, A312. Accordingly, Plaintiff argued that Defendants' motions were untimely pursuant to Mo. Sup. Ct. R. 51.045 and, pursuant to the express warning set forth in the Rule, the issue of improper venue was waived. *Id.*

On December 21, 2012, several Defendants, including Relator, joined to file their Reply on the Motion to Transfer Venue. *See* Rel.'s Appendix, A434-A441. Notably, the Reply makes absolutely no reference to the date of service of Relator Schwarz, nor does it attempt to argue that the motion was timely because it was filed within 60 days of the date of service upon Schwarz. *See generally id.* Relator did not otherwise make anything a part of the formal record before the circuit court setting forth its position on the matter.

On July 2, 2013, Relator and its co-Defendants filed separate but essentially identical petitions for writs of prohibition with this Court in the wake of the denial

of similar writs in the Eastern District Court of Appeals. *See* Rel. Appendix A518; Resp. Appendix A1-A169. On August 13, 2013, this Court denied the petitions submitted by Wyeth *et al*, but issued preliminary writs of prohibition with respect to the petitions submitted by Relator and ordered Respondent to file a response thereto. *See* Resp. Appendix A170-AA176; Rel.'s Appendix, A570. Respondent submitted its timely Answers to the Writs on September 12, 2013. *See* Rel.'s Appendix, A571-589.

POINTS RELIED ON

I. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Relator Waived Its Argument That It Had Sixty Days From Service Of Any Pleading Upon It By Failing To Properly Raise It And Make It Part Of The Record Before Respondent.

Howard v. City of Kan. City, 332 S.W.3d 772, 791 (Mo. 2011)

Norden v. Friedman, 756 S.W.2d 158, 162 (Mo. 1988)

Hendershot v. Minich, 297 S.W.2d 403, 408-10 (Mo. 1956)

II. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Relator Waived Its Argument That It Had Sixty Days From Service Of Bryan's Individual Petition Upon It By Failing To Properly Raise It And Make It Part Of The Record Before Respondent.

Howard v. City of Kan. City, 332 S.W.3d 772, 791 (Mo. 2011)

Norden v. Friedman, 756 S.W.2d 158, 162 (Mo. 1988)

Hendershot v. Minich, 297 S.W.2d 403, 408-10 (Mo. 1956)

III. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Even Assuming Arguendo That Venue Does Not Lie In St.

Louis City And That Relator Has Not Waived Its Argument On This Point, It Has Still Failed To Demonstrate The Extreme Need For Preventive Action To Warrant An Extraordinary Writ.

Smith v. Brown & Williamson Tobacco Corp., 2013 Mo. LEXIS 251, 12 (Mo. Sept. 10, 2013)

State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750, 752 (Mo. 1991)

Derfelt v. Yocom, 692 S.W.2d 300, 301 (Mo. banc 1985)

ARGUMENT

I. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Relator Waived Its Argument That It Had Sixty Days From Service Of Any Pleading Upon It By Failing To Properly Raise It And Make It Part Of The Record Before Respondent.

It is well-settled that "[o]bjection to venue, unlike jurisdiction of the court, can be waived by a party who might be entitled to assert it." *Jones v. Church*, 252 S.W.2d 647, 648 (Mo. Ct. App. 1952), *citing Robinson v. Field*, 342 Mo. 778, 796 (Mo. 1938).[2] Such is the case here – Relator declined to raise the argument upon which it now relies in its motion papers before Respondent, and has not properly preserved the matter for this Court's review. It has therefore been waived.

Rule 55.26, pertaining to the form of motions, provides that motions such as Relator's motion to transfer venue, "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Relator's Motion to Transfer Venue (Rel.'s Appendix, A231), however, **made**

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[2] Respondent makes no effort to argue that the factual patterns in *Jones* and *Robinson* exactly mirror the situation presented here, and it is of no consequence that they do not. Both *Jones* and *Robinson* are simply proffered for the straightforward – and uncontroversial – notion that an objection to venue can in fact be waived by a party that would otherwise be entitled to assert it.

absolutely no reference to the date it was served or the grounds for relief upon which it now slavishly relies. Furthermore, even in the wake of the filing of Plaintiffs' response to the transfer motion where **the timing of Defendant's motion was expressly challenged** (*see* Rel.'s Appendix, A312), Relator filed a reply which made no reference to the suggestion that the October service upon Schwarz rendered its transfer motion timely and did not otherwise alert the parties or the Court to its current position (Rel.'s Appendix, A434).

Indeed, the argument that now forms the sole basis for Relator's request for this extraordinary relief appears nowhere in the extensive written record that has been developed in this case. This, of course, results in waiver of the argument. *See e.g., Sams v. Green*, 591 S.W.2d 15, 18 (Mo. Ct. App. 1979) ("The appellate court will not consider post-trial recollections of what transpired at trial to complete, correct, or impeach the recorded transcript."), *citing Hendershot v. Minich*, 297 S.W.2d 403, 408-10 (Mo. 1956); *Chilton v. Gorden*, 952 S.W.2d 773 (Mo. App. S.D. 1997) ("The obligation to make a record during trial concerning issues a party may wish to present on appeal is on that party. No record was made. There is nothing to review.") (internal citations omitted); *Howard v. City of Kan. City*, 332 S.W.3d 772, 791 (Mo. 2011) ("Because the City did not argue against the submissibility of future damages in its motion for directed verdict, it has failed to preserve the issue for appeal."); *Norden v. Friedman*, 756 S.W.2d 158, 162 (Mo. 1988) (failure to raise arguments constitutes waiver); *see also State v. Smith,* 743 S.W.2d 416, 417 (Mo. Ct. App. 1987) ("objection must be specific," holding

that raising different argument than that raised on appeal failed to preserve issue for appeal); *Frein v. Madesco Inv. Corp.*, 735 S.W.2d 760, 762 (Mo. Ct. App. 1987) (argument of different theory for position on appeal inappropriate); *Stenger v. Great Southern Sav. & Loan Asso.*, 677 S.W.2d 376, 382 (Mo. Ct. App. 1984) (argument set forth in reply and discussed in oral argument insufficiently preserved for appeal).

Relator's attempts to distinguish some (but tellingly, not all) of Respondent's authorities on the issue of waiver are unavailing. For example, Relator places great significance on the fact that *Norden* is a case involving the failure to raise a statue of frauds defense. The subject matter of the case is of little significance as compared to the overarching holding that arguments not properly made a part of the circuit court record are waived. From the standpoint of the record that has been preserved for review, this case and *Norden* are identical – in both instances, parties were seeking appellate review but relying upon arguments they did not properly make a part of the record.

The same can be said of the *Howard* case. As in *Howard*, the written record in this case is bereft of any reference to the argument upon which Relator now relies, and Respondent denies Relator's suggestion that there was a judicial admission with respect to the timeliness of the motion at the oral motion hearing. *See* Answer, at ¶19, Rel.'s Appendix A575. In terms of the record presented to this Court on the argument at issue, there is no substantive difference between the

two scenarios – in both instances, a party was trying to rely upon an argument that was not properly made part of the record before the trial court. This is improper.

Relator relies upon *State ex rel Carver v. Whipple*, 608 S.W.2d 410 (Mo. 1980), for the suggestion that this Court should rescue it from its own blunder in failing to preserve its argument for review by considering it anyway. The *Carver* matter, which involved alleged harm of a far more extreme nature, is readily distinguishable. In that case, relator sought to prohibit Judge Whipple from arraigning him on a charge of **first degree murder**. *Id.*, at 411. Given the severity of the charges, the obvious violation of relator's constitutional rights, and the ramifications of allowing the normal appellate process to run its course, it is easy to understand why this Court found it appropriate to use its discretion to find in relator's favor, even on a basis not argued. Obviously, the alleged "harm" to relator in the instant case is not remotely comparable to that at issue in that case. Accordingly, even to the extent that *Carver* may stand for the proposition that this Court *may*, in appropriate circumstances, consider arguments not made a part of the trial court record, it does not suggest that this Court should routinely step in to rescue litigants by considering arguments only made a part of the record for the first time on appeal, or that it should do so in this case.

II. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Relator Waived Its Argument That It Had Sixty Days

From Service Of Bryan's Individual Petition Upon It By Failing To Properly Raise It And Make It Part Of The Record Before Respondent.

The general thrust of Relator's argument with respect to the service of the individual Petition upon it is that it should be treated differently than its co-defendants because it was served *after* the August 8, 2012 Severance Order. Of course, this argument, like its other arguments, was not properly raised before Respondent, with Relator instead content to hitch its wagon to the efforts and arguments of the remaining defendants. At no point over the course of the proceedings before Respondent did Relator ever attempt to take a position that differed from its co-defendants or make a proper record of the position upon which it now relies. As discussed in more detail in the preceding section, *supra*,[3] this constitutes a waiver of the argument, and Relator cannot now rely upon those arguments as a basis for granting this extraordinary relief.

III. Relator Is Not Entitled To A Permanent Order Prohibiting Respondent From Enforcing His Order Denying Relator's Motion To Transfer, Because Even Assuming Arguendo That Venue Does Not Lie In St. Louis City And That Relator Has Not Waived Its Argument On This Point, It

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[3] To the extent that Respondent's response to Relator's Second Point Relied On regarding waiver is identical to the response to Relator's First Point Relied On, Respondent incorporates by reference the arguments and authorities in support of waiver advanced *supra*.

Has Still Failed To Demonstrate The Extreme Need For Preventive Action To Warrant An Extraordinary Writ

A. Relator Has Failed to Demonstrate An Extreme Need for Preventive Action

It is well-settled that a writ of prohibition does not issue as a matter of right, and whether a writ should be issued in a particular case is a question left to the sound discretion of this Court. *See Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). Indeed, this Court has previously observed that:

> Because this extraordinary legal remedy provides litigants with abundant opportunity to circumvent the normal appellate process, we are mindful that courts should employ the writ judiciously and with great restraint. **A court should only exercise its discretionary authority to issue this extraordinary remedy when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventive action.** Absent such conditions, the court should decline to act.

Derfelt v. Yocom, 692 S.W.2d at 301 (emphasis added); *see also State ex rel. J.E. Dunn Constr. Co. v. Fairness in Constr. Bd.*, 960 S.W.2d 507, 511 (Mo. Ct. App. 1997) ("A writ of prohibition is an extraordinary remedy and it should be used with 'great caution, forbearance, and only in cases of extreme necessity.'"), *quoting Missouri Dept. of Soc. Serv. v. Admin. Hearing Comm'n*, 826 S.W.2d 871, 873 (Mo. App. 1992).

Moreover, to warrant prohibition, a showing that the trial court was incorrect is insufficient – Relator must also demonstrate that the matter is essentially not reviewable on appeal. *See e.g., State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991) ("Prohibition is not generally intended as a substitute for correction of alleged or anticipated judicial errors and it cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial proceedings."), *citing Knisley v. State*, 448 S.W.2d 890, 892 (Mo. 1970); *see also State ex rel. J.E. Dunn Constr. Co.*, 960 S.W.2d at 511. "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994), *citing State ex rel. Morasch v. Kimberlin*, 654 S.W.2d 889, 892 (Mo. banc 1983).

Although it is true that improper venue is one of bases upon which writs of prohibition may be issued, the circumstances of this case make it abundantly clear that this is not a circumstance where the extraordinary remedy of prohibition should issue. First and foremost, Relator makes no effort to quantify any of the irreparable harm it alleges it will sustain if a writ of prohibition is not entered in this case, instead offering only vague and assumptive references to inconvenience, and hypothetical undefined suggestions of prejudice. This is insufficient to satisfy Relator's burden of demonstrating an imminent need for this extraordinary relief.

Finally, it is not the case, as Relator suggests, that proceedings in this case going forward will be an utter nullity with no value to the overall litigation

process in the absence of the issuance of this writ. As Relator expressly notes, Rule 51.045(c) envisions circumstances where less than the entire civil action may be transferred, so while the case against Relator has not been severed, it could be. With this in mind, it is at this point premature to conclude that the entirety of the case would necessarily be properly venued in St. Louis County. In any event, the work product generated by the parties would be of great value in advancing the litigation to Relator regardless of the venue, even if it were subsequently determined that venue should be somewhere other than St. Louis City.[4]

B. This Court Has Already Found This Factual Scenario Insufficient to Warrant Prohibition

Defendant devotes an overwhelming amount of its argument to the suggestion that venue is not proper in the City of St. Louis and that this, in and of itself, warrants prohibition. Although it is true that improper venue is one of bases upon which writs of prohibition may be issued, this Court has already considered and rejected this argument on these very facts.

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[4] Respondent explicitly denies that venue is improper. Furthermore, there are methodologies available to the parties, such as agreeing that discovery previously conducted need not be repeated, that could further blunt any concerns about wasting time and resources.

Specifically, it bears mention that there were two separate writs submitted to this Court with respect to venue in St. Louis City Cause No. 1222-CC10178 – that filed by Wyeth *et al (see* Respondent's Appendix A1-22), and the writ application that is currently before this Court submitted by Relator Schwarz (*see* Rel.'s Appendix A451-59). The facts relevant to the question of the propriety of venue in the City of St. Louis are identical as to both of these writs. On these facts, this Court declined to issue a writ with respect to Wyeth's application in this case and in several similar cases (*see* Respondent's Appendix A170-A176), leading to the logical conclusion either that venue was proper in the City of St. Louis, or that even though it was not, prohibition was not warranted under the circumstances.[5] This constitutes the law of the case with respect to St. Louis City Cause No. 1222-CC10178.

As such, the law of the case should direct this Court to follow its prior holding on this issue and conclude that the circumstance does not require the

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[5] Respondent does not suggest, as Relator states in its Brief (*see* Brief at 25), that this Court issued a ruling on the merits when denying the writ petitions submitted by Wyeth *et al.* With that said, the fact that the writs did not, in fact, issue as to Wyeth leads to the self-evident conclusion that the factual circumstances underlying the Wyeth writ petitions – which are identical to the factual circumstances here – did not at a minimum rise to the level of requiring this Court's intervention.

extreme remedy of prohibition. This Court has previously noted that "[t]he doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue..." and "insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." *Smith v. Brown & Williamson Tobacco Corp.*, 2013 Mo. LEXIS 251, 12 (Mo. Sept. 10, 2013), *citing Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007).

Such is the case here. Having already declined to issue a writ on these very facts as to the majority of the Defendants in this case, all of whom had ample opportunity to fully set forth their arguments protecting identical interests to those of Relator, this Court declined to issue an extraordinary writ. In the interest of preserving that ruling and ensuring consistency and uniformity of decision, this Court should dissolve the preliminary writ and restore the status quo.

CONCLUSION

For the foregoing reasons, the preliminary writ issued by this Court should be dissolved.

Respectfully submitted this 14th day of November, 2013.

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Certification Pursuant to Rule 84.06(c)

The undersigned hereby certifies that the foregoing complies with the limitations set forth in Rule 84.06(b) in that it contains 3,082 words as determined by Microsoft Word.

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Certificate of Service

The undersigned hereby certifies that the foregoing Respondent's Brief was filed using the Court's electronic case filing system on this 14th day of November, 2013.

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